



FEDERAL RESERVE SYSTEM

12 CFR Part 229

Regulation CC; Docket No. R-1620; RIN 7100 AF-14

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is publishing a final rule that amends Subpart C of Regulation CC to address situations where there is a dispute as to whether a check has been altered or was issued with an unauthorized signature, and the original paper check is not available for inspection. This rule adopts a presumption of alteration for disputes between banks over whether a substitute check or electronic check contains an alteration or is derived from an original check that was issued with an unauthorized signature of the drawer.

DATES: Effective January 1, 2019.

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SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

Congress enacted the Expedited Funds Availability Act of 1987 (EFA Act) to provide prompt funds availability for deposits in transaction accounts and to foster

improvements in the check collection and return processes. Section 609(c) authorizes the Board to regulate any aspect of the payment system and any related function of the payment system with respect to checks in order to carry out the provisions of the EFA Act.¹

Regulation CC implements the EFA Act. Subpart C of Regulation CC implements the EFA Act's provisions regarding forward collection and return of checks.

II. Summary of UCC and Current Regulation CC

Under the Uniform Commercial Code (UCC), an alteration is a change to the terms of a check that is made after the check is issued that modifies an obligation of a party by, for example, changing the payee's name or the amount of the check.² By contrast, a forgery is a check on which the signature of the drawer (i.e., the account-holder at the paying bank) was made without authorization at the time of the check's issuance.³ In general, under UCC 4-401, the paying bank may charge the drawer's account only for checks that are properly payable.⁴ Neither altered checks nor forged checks are properly payable. In the case of an altered check under the UCC, the banks that received the check during forward collection, including the paying bank, have

¹ EFA Act section 609(c)(1) states that in order to carry out the provisions of this chapter, the Board of Governors of the Federal Reserve System shall have the responsibility to regulate—(A) any aspect of the payment system, including the receipt, payment, collection, or clearing of checks; and (B) any related function of the payment system with respect to checks. See, 12 U.S.C. 4008(c)(1).

² UCC 3-407. The UCC is a body of laws approved by the American Law Institute and the Uniform Law Commission, which has been enacted by state legislatures on a generally uniform basis. Article 3 addresses negotiable instruments, while Article 4 addresses bank deposits and collections.

³ The term “forgery” is not defined in the UCC. However, the term “unauthorized signature” is defined as “a signature made without actual, implied, or apparent authority” and “includes a forgery.” UCC 1-201(41).

⁴ The term “bank” as used in this notice and in Regulation CC (12 CFR 229.2(e)) includes a commercial bank, savings bank, savings and loan association, credit union, and a U.S. agency or branch of a foreign bank.

warranty claims against the banks that transferred the check (e.g., a collecting bank or the depository bank). In the case of a forged check, however, the UCC places the responsibility on the paying bank for identifying the forgery.⁵ Therefore, the depository bank typically bears the loss related to an altered check, whereas the paying bank bears the loss related to a forged check.

These provisions of the UCC reflect the long-standing rule set forth in *Price v. Neal* that the paying bank must bear the loss when a check it pays is not properly payable by virtue of the fact that the drawer did not authorize the item.⁶ The *Price v. Neal* rule reflects the assumption that the paying bank, rather than the depository bank, is in the best position to judge whether the drawer's signature on a check is the authorized signature of the account-holder. By contrast, the depository bank is arguably in a better position than the paying bank to inspect the check at the time of deposit and detect an alteration to the face of the check, to determine that the amount of the check is unusual for the depository bank's customer, or to otherwise take responsibility for the items it accepts for deposit.

Regulation CC does not currently address whether a check should be presumed to be altered or forged in cases of doubt. For example, an unauthorized payee name could result from an alteration of the original check that the drawer issued, or from the creation of a forged check bearing the unauthorized payee name and an unauthorized/forged drawer's signature. Courts have reached opposite conclusions as to whether a paid, but fraudulent, check should be presumed to be altered or forged in the absence of evidence

⁵ The presenting bank warrants to the paying bank only that it has no knowledge of an unauthorized drawer's signature. See UCC 3-417(a)(3) and 4-208(a)(3).

⁶ *Price v. Neal*, 97 Eng. Rep. 871 (K.B. 1762).

(such as the original check).⁷ Since the time of these decisions, the check collection system has become virtually all-electronic, and the number of instances in which the original paper check is available for inspection in such cases will be quite low.⁸ Unlike the 2006 court cases, where the paying bank received and destroyed the original check, in today's check environment the original check is typically truncated by the depository bank or a collecting bank before it reaches the paying bank.

III. Summary of Proposal and Comments

A. Summary of Proposal

On June 2, 2017, the Board published a notice of proposed rulemaking intended to clarify the burden of proof in situations where there is a dispute as to whether the check has been altered or is a forgery, and the original paper check is not available for inspection.⁹ The Board proposed to adopt a presumption of alteration with respect to any dispute arising under Federal or State law as to whether the dollar amount or the payee on a substitute check or electronic check has been altered or whether the substitute check or electronic check is derived from an original check that is a forgery. Under the proposed rule, the presumption of alteration may be overcome by a preponderance of evidence that

⁷ See, e.g., *Chevy Chase Bank v. Wachovia Bank, N.A.*, 208 Fed. App'x. 232, 235 (4th Cir. 2006) and *Wachovia Bank, N.A. v. Foster Bancshares, Inc.*, 457 F.3d 619 (7th Cir. 2006).

⁸ For example, by the beginning of 2017 the Federal Reserve Banks received over 99.99 percent of checks electronically from 99.06 percent of routing numbers and presented over 99.99 percent of checks electronically to over 99.76 percent of routing numbers. As of the same time, the Federal Reserve Banks received 99.63 percent of returned checks electronically from over 99.37 percent of routing numbers and delivered 99.41 percent of returned checks electronically to 92.84 percent of routing numbers.

⁹ In response to a 2011 proposed rulemaking, two commenters requested that the Board address the uncertainty caused by the divergent appellate court decisions, even though the Board did not raise the issue. 76 FR 16862 (March 25, 2011). The Board described these comments in greater detail as part of its 2014 Regulation CC proposal and requested comment on whether it should adopt a presumption of alteration. 79 FR 6673, 6703 (Feb. 4, 2014). Based on its analysis of the comments received in the 2014, the Board requested comment on proposed regulatory text and commentary on June 2, 2017. 82 FR 25539 (June 2, 2017).

the substitute check or electronic check accurately represents the dollar amount and payee as authorized by the drawer, or that the substitute check or electronic check is derived from an original check that is a forgery. In the proposed rule, the presumption of alteration shall cease to apply if the original check is made available for examination by all parties involved in the dispute. The Board requested comment on whether the presumption should apply to a claim that the date was altered. The Board also requested comment on whether the presumption should apply if the bank claiming the presumption received and destroyed the original check.

B. Summary of General Comments

The Board received eleven responses to its proposal from a variety of commenters, including financial institutions, trade associations, and clearinghouses. Ten commenters, including a comment letter submitted by a group of institutions and trade associations (“group letter”), generally supported the Board’s proposal to adopt a presumption of alteration. Commenters supported the presumption of alteration because it aligned Regulation CC with current practices and created a uniform rule. One commenter stated that the proposed presumption was not necessary because the difference between alteration and forgery are well-known in the industry and the use of an evidentiary presumption may require institutions to unnecessarily increase the expense to store documents. Detailed comments are discussed in the description of the final rule below.

C. Consultation with Other Agencies

As directed by section 609(e) of the EFA Act, the Board consulted with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance

Corporation, and the National Credit Union Administration Board during the rulemaking process.¹⁰

IV. Summary of Final Rule

The Board has considered all comments received and has adopted a presumption of alteration. The Board has made certain modifications to the proposed presumption in light of comments received, as discussed below.

Altered Date. The Board’s proposed presumption covered alterations to the dollar amount and payee. The Board requested comment on whether the presumption of alteration should apply to a claim that the date was altered. Six commenters, including the group letter, supported applying the presumption to claims that the date was altered and one commenter requested the Board investigate whether applying the presumption to such claims would promote greater certainty in the check collection process. Two commenters, including the group letter, noted that a claim that the date was altered may be alleged 1) where the date of a post-dated check is altered to make the check currently payable, and as a result, the paying bank pays the check when presented and incurs a loss to its customer which would not have resulted had the paying bank paid the check upon or following the date on the check was issued by the customer; and 2) where the date is altered to a more recent date in order to convey holder-in-due-course status on the depositor or to otherwise avoid a “stale-date” rejection by the paying bank. Three commenters suggested that the Board align the definition of “alteration” with the

¹⁰ 12 U.S.C. 4008(e).

definition in the UCC, which would include alteration of the date field.¹¹ One Federal Reserve Bank commenter stated that fraud could be committed by altering a number of fields, including name of payee, amount, date, check number, routing number, payee's indorsement, etc., and that the Board should address the entire scope of the legal uncertainty by using the UCC definition of alteration.

Based on the comments received, the Board has modified the presumption in the final rule so that the term "alteration" is used as defined in the UCC. The Board believes that aligning the presumption with the UCC's definition of "alteration" appropriately expands the scope of the presumption to cover instances of fraud beyond changes to the dollar amount or payee. The Board notes in the commentary that terms that are not defined in section 229.2, such as "alteration," have the meanings set forth in the UCC and provides examples of alterations.

Bank that received and destroyed the original check. The presumption in the proposed rule would apply to disputes involving a substitute check or an electronic check, and thus the presumption could not be asserted by a bank that received the original check. The Board requested comment on whether the presumption should apply if the bank claiming the presumption received and destroyed the original check.

Six commenters, including the group letter, stated that the presumption should not apply to paying banks that received and destroyed the original check. These commenters noted that it is rare for a paying bank to receive an original check. A paying bank may receive the original check from the depository bank via direct presentment if it is a very

¹¹ Under the UCC, alteration means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party. UCC section 3-407.

high dollar check or if the depository bank has concerns with certain aspects of the check, such as unclear terms or a smudged signature. A paying bank may also request and receive the original check after receiving presentment of an electronic check due to a dispute about the check image. These commenters stated that receipt of an original check by a paying bank puts the paying bank on notice about the possible importance of the original check, and the paying bank should not have the benefit of the presumption of alteration if it receives the original check.

Commenters were split on whether the presumption should apply to a bank, other than the paying bank, if it received and destroyed the original check. The group letter stated that the presumption should apply in these cases because it would promote check truncation by not creating a legal disincentive to the destruction of checks by such banks. Three commenters stated that the presumption should not apply to any bank that received and destroyed the original check because a bank should not benefit from a presumption against another party when it had in its possession potential evidence to resolve a dispute regarding alteration or forgery.

In the final rule, the presumption of alteration applies to a dispute between banks where an electronic check or a substitute check was transferred between those banks. The presumption applies in such a dispute regardless of where in the chain, or by whom, the original check was truncated. However, as noted in the commentary, the presumption does not apply to a dispute between banks where the original check was transferred between those banks, even if that check is subsequently truncated and destroyed. The Board believes that the final rule addresses the concerns raised by the commenters who argued that the presumption of alteration should not apply if the paying bank received the

original check. As a presumption of alteration generally favors the paying bank (the depository bank is generally liable for alterations), the commenters' concern was that the application of the presumption should not incentivize a paying bank to destroy the original check after being put on notice of potentially high-risk items by receiving the original check. When a paying bank receives presentment of the original check, the presumption of alteration would not apply, as the presumption applies only to disputes concerning substitute checks or electronic checks. In another example noted by commenters, a paying bank may request and receive the original check after receiving presentment of an electronic check due to a dispute about the check image. In that scenario, the presumption of alteration would not apply pursuant to § 229.38(i)(3), which states that the presumption no longer applies if the original check is made available for examination by all parties involved in the dispute.

The Board does not believe that limiting the application of the presumption to the transfer of electronic checks or substitute checks will create a material incentive for depository banks or collecting banks to bypass the check imaging process and send forward a substantial number of original checks merely to preserve the presumption of alteration. As the commenters noted, the expense of handling checks physically would likely be merited only in rare cases where a bank had substantial concerns about certain aspects of the check.

Rebutting the presumption and effect of producing the original check. One Federal Reserve Bank commenter suggested that the Board allow the presumption to be overcome only by the production of the original check, and not by proving by a preponderance of the evidence that the check was not altered or was forged. The

commenter stated that a stronger evidentiary presumption in favor of alteration would be more efficient, as parties may continue to expend resources litigating the issue of whether an item is an alteration or forgery. Two commenters requested that the Board specify who would have the authority to determine whether evidence satisfied a preponderance of evidence burden. One commenter requested that the Board provide additional clarity as to what type of evidence would be adequate to overcome the presumption of alteration. Two commenters suggested that the Board set a time limitation in which a financial institution could request the original check in cases of doubt, such as ten business days. Additionally, one commenter requested that the Board allow a scanned image of the original check in lieu of the original to avoid the presumption of alteration.

In proposing the presumption of alteration, the Board did not intend to eliminate the opportunity for banks to provide additional evidence and engage in further litigation. The presumption was intended to create a uniform starting point that recognized the operational realities of check fraud in the absence of evidence. The comments requesting that the Board specify who can make the determination, what types of evidence would be adequate for overcoming the presumption of alteration, and the time limitation within which the original check must be provided would be matters for the court or other dispute resolution process and are outside of the scope of this final rule. A scanned image of the original check would generally provide no better evidentiary value than a substitute check or an electronic check, and thus the final rule does not permit such an image to overcome the presumption of alteration. Accordingly, the Board has adopted provisions on the rebuttal of the presumption in § 229.38(i)(2) substantially as proposed.

Use of term “forgery.” One Federal Reserve Bank commenter suggested that the Board use the phrase “issued without the account holder’s authorization” instead of the term “forgery.” The Federal Reserve Bank commenter stated that under the UCC, the payor bank is generally liable for paying a check if the issuance of the check was not authorized by the accountholder, whether there is a forged drawer’s signature on the check or not.

In the Board’s final rule, the Board has adopted this suggestion. The presumption will apply to disputes as to whether a substitute check or electronic check contains an alteration or is derived from an original check that was issued with an unauthorized signature of the drawer. The Board believes that adopting the phrase “issued with an unauthorized signature of the drawer” appropriately covers the entire scope of the payer bank’s liability for paying an item that is not properly payable because the accountholder has not authorized the issuance of the item. As stated in relation to “alteration,” the Board notes in the commentary that terms that are not defined in § 229.2, such as “unauthorized signature,” have the meanings set forth in the UCC and provides examples of unauthorized signatures.

Other topics. The Board also received comments on a variety of other topics. Two commenters, including the group letter, suggested that the Board clarify that the presumption also applies to alteration of the electronic image and not just the original check. The group letter also requested that the Board clarify that the parties should have the ability to vary the presumption to the maximum extent permitted under § 229.37. In the final rule, the Board has clarified in the commentary that the alteration claim may be related to the original check or the electronic or substitute check. The Board also

included in the commentary a sentence stating that the presumption of alteration may be varied by agreement to the extent permitted under § 229.37.

One commenter requested that the Board ensure that the presumption can be applied only in disputes between banks, and not disputes between banks and customers. In the final rule, the Board has specified in § 229.38(i)(1) that the presumption applies to disputes between banks.

The group letter requested that the Board clarify that the presumption applies to disputes where the loss allocation rules for bank and non-bank parties are established under private contract or by laws other than Regulation CC and the UCC, such as private presentment arrangements or Federal regulations that apply to Treasury checks. As stated earlier, the intent behind the presumption of alteration is to create a uniform starting point in the absence of evidence under Federal and State laws. As stated above, the final rule does not prevent banks from varying the presumption of alteration by agreement to the extent permitted under § 229.37. However, the Board did not intend to override any other Federal statute or regulation, such as U.S. Treasury rules governing Treasury checks, to the extent that they already address the issue that the presumption is intended to address. In the final rule, the Board has indicated that the presumption applies in the absence of any Federal statute or regulation to the contrary.

One commenter requested that the Board require banks that receive original checks to preserve them for a set period of time. A retention requirement for physical checks would impose a record-keeping and storage burden for banks. The Board believes a more appropriate approach is for the rule to establish responsibilities with respect to the

handling of checks and for banks to determine their own physical check retention policies based on their assessment of risk.

IV. Competitive Impact Analysis

The Board conducts a competitive impact analysis when it considers an operational or legal change, if that change would have a direct and material adverse effect on the ability of other service providers to compete with the Federal Reserve in providing similar services due to legal differences or due to the Federal Reserve's dominant market position deriving from such legal differences. All operational or legal changes having a substantial effect on payments-system participants will be subject to a competitive-impact analysis, even if competitive effects are not apparent on the face of the proposal. If such legal differences exist, the Board will assess whether the same objectives could be achieved by a modified proposal with lesser competitive impact or, if not, whether the benefits of the proposal (such as contributing to payments-system efficiency or integrity or other Board objectives) outweigh the materially adverse effect on competition.¹²

The Board does not believe that the amendments to Regulation CC will have a direct and material adverse effect on the ability of other service providers to compete effectively with the Reserve Banks in providing similar services due to legal differences. The amendments would apply to the Reserve Banks and private-sector service providers alike and would not affect the competitive position of private-sector banks vis-à-vis the Reserve Banks.

V. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506;

¹² Federal Reserve Regulatory Service, 7-145.2. *See*, <https://www.federalreserve.gov/publications/reginfo.htm>.

5 CFR part 1320 Appendix A.1), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The Board reviewed the final rule under the authority delegated to the Board by the OMB and determined that it contains no collections of information under the PRA.¹³ Accordingly, there is no paperwork burden associated with the rule.

VI. Regulatory Flexibility Act

An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with section 3(a) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq. (RFA). In the IRFA, the Board requested comment on the effect of the proposed rule on small entities and on any significant alternatives that would reduce the regulatory burden on small entities. The Board did not receive any comments. The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. In accordance with section 3(a) of the RFA, the Board has reviewed the final regulation. Based on its analysis, and for the reasons stated below, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The final rule will apply to all depository institutions regardless of their size.¹⁴ Pursuant to regulations issued by the Small Business Administration (13 CFR 121.201), a “small banking organization” includes a depository institution with \$550 million or less

¹³ See 44 U.S.C. 3502(3).

¹⁴ The rule would not impose costs on any small entities other than depository institutions.

in total assets. Based on 2017 call report data, there are 9,631 depository institutions that have total domestic assets of \$550 million or less and thus are considered small entities for purposes of the RFA. The presumption of alteration shifts the burden to the bank that warrants that a check has not been altered, which could be a depository bank or collecting bank. In order to overcome the presumption of alteration, a depository bank or collecting bank must prove by a preponderance of evidence either the substitute check or electronic check does not contain an alteration, or that the substitute check or electronic check is derived from an original check that was issued with an unauthorized signature of the drawer. Under the final rule, the presumption of alteration shall cease to apply if the original check is made available for examination by all parties involved in the dispute. Furthermore, the presumption of alteration will not apply if the paying bank received the original check from which the substitute check or electronic check was derived.

A depository bank or collecting bank that destroys all original checks after truncation may incur additional risk, as it may not be able to overcome the presumption of alteration. The Board expects the additional risk to be minimal. According to Federal Reserve data, only 0.015% of forward items collected through the Reserve Banks were returned due to a claim of alteration or forgery in March 2018. The Board expects depository banks and collecting banks to weigh the costs and benefits of destroying or retaining original checks, such as for large dollar amounts, so that the presumption of alteration will not apply. In their roles as paying banks, however, those same banks could benefit from the presumption. Additionally, a depository bank that permits remote deposit capture may also incur additional risk, as it may not be able to obtain the original check to overcome the presumption of alteration. The Board expects depository banks to

examine their protocols for remote deposit capture, such as limiting the amount of money that may be deposited remotely. The Board expects that depository institutions will benefit from a uniform rule when there is an absence of evidence over whether a check has been altered or forged and may have reduced litigation and dispute resolution costs. The Board does not expect the rule to have a significant economic impact on a substantial number of small entities.

List of Subjects in 12 CFR Part 229

Banks, Banking, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board to amends 12 CFR part 229 as follows:

PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

1. The authority citation for part 229 continues to read as follows:

Authority: 12 U.S.C. 4001-4010, 12 U.S.C. 5001-5018.

Subpart C—Collection of Checks

2. In § 229.38, paragraph (i) is added to read as follows:

§ 229.38 Liability.

* * * * *

(i) *Presumption of Alteration*—(1) *Presumption*. Subject to paragraphs (i)(2) and (3) of this section and in the absence of a Federal statute or regulation to the contrary, the presumption in this paragraph applies with respect to any dispute between banks arising under Federal or State law as to whether a substitute check or electronic check transferred between those banks contains an alteration or is derived from an original check that was

issued with an unauthorized signature of the drawer. When such a dispute arises, there is a rebuttable presumption that the substitute check or electronic check contains an alteration.

(2) *Rebuttal of presumption.* The presumption of alteration may be overcome by proving by a preponderance of evidence that either the substitute check or electronic check does not contain an alteration, or that the substitute check or electronic check is derived from an original check that was issued with an unauthorized signature of the drawer.

(3) *Effect of producing original check.* If the original check is made available for examination by all banks involved in the dispute, the presumption in paragraph (i)(1) of this section shall no longer apply.

3. In appendix E, section XXIV, add reserved paragraphs E through H and paragraph I to read as follows:

Appendix E to Part 229—Commentary

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XXIV. Section 229.38 Liability

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E through H [Reserved]

I. 229.38(i) Presumption of Alteration

1. This paragraph applies to disputes between banks where one bank has sent an electronic check or a substitute check for collection to the other bank. The presumption of alteration does not apply to a dispute between banks where one bank sent the original check to the other bank, even if that check is subsequently truncated and destroyed. The

presumption of alteration applies with respect to claims that the original check or to the electronic check or substitute check was altered or contained an unauthorized signature.

2. The presumption of alteration applies when the original check is unavailable for review by the banks in context of the dispute. If the original check is produced, through discovery or other means, and is made available for examination by all the parties, the presumption no longer applies.

3. This paragraph does not alter the transfer and presentment warranties under the UCC that allocate liability among the parties to a check transaction with respect to an item that has been altered or that was issued with an unauthorized signature of the drawer. The UCC or other applicable check law continues to apply with respect to other rights, duties, and obligations related to altered or unauthorized checks. In addition, the presumption does not apply if it is contrary to another Federal statute or regulation, such as the U.S. Treasury's rules regarding U.S. Treasury checks. The presumption of alteration may be varied by agreement to the extent permitted under § 229.37.

4. As stated in § 229.2, terms that are not defined in that section have the meanings set forth in the Uniform Commercial Code. "Alteration" is defined in UCC 3-407 and includes both (i) an unauthorized change in a check that purports to modify in any respect the obligation of a party, and (ii) an unauthorized addition of words or numbers or other change to an incomplete check relating to the obligation of a party. Alterations could include, for example, an unauthorized change to a payee name or a change to the date on a post-dated check that purports to make the check currently payable. "Unauthorized signature" is defined in UCC 1-201 and further discussed in

UCC 3-403. An unauthorized signature could include a forgery as well as a signature made without actual or apparent authority.

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By order of the Board of Governors of the Federal Reserve System, September 11, 2018.

Ann Misback,
Secretary of the Board.
[FR Doc. 2018-20029 Filed: 9/14/2018 8:45 am; Publication Date: 9/17/2018]

BILLING CODE: 6210-01P